IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.2534 OF 2005.

Avinash Tukaram Sanas,
Age 38, Occ.: Service,
R/o. 101, Carnation Building,
Satguru Garden Complex,
Chendani Koliwada, Kopri,
Thane (East). .... Applicant.
(Org.Accused No.7.)

Versus.

The State of Maharashtra,
(At the instance of Anti
Corruption Bureau, Special
Cell, Mumbai Unit.) .... Respondent.

Shri M.S.Mohite with Shri Sameer Vaidya i/by Shri Naveen Chomal for the Applicant.

Shri A.S.Gadkari, A.P.P. for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 30th June, 2005.

ORAL JUDGMENT.

1. This Application was heard at length on various dates fixed in the matter. Today I have heard further submissions made by the Counsel appearing for the parties. This is an Application for bail filed by the Applicant. The Applicant is accused No.7 in what is popularly known as MPSC Scam case. The Applicant was holding the post of a Class I Officer in the Government

of Maharashtra and he was Personal Secretary to a Minister of the Government of Maharashtra.

2. The Application made by the Applicant before the learned Special Judge was rejected and thereafter Application No.3108 of 2003 was filed by the Applicant in this Court. The said Application also came to be rejected. The said earlier Applications were for seeking bail on the ground of default in filing charge sheet. Subsequently the Applicant again applied for bail before the learned Special Judge. The said Application was on the basis of claim of parity based on order passed by the Apex Court in case of co-accused P.D.Wani and an order passed by this Court in case of another co-accused Sanjay Gangadhar Patil. The said Application came to be rejected. Thereafter Criminal Application No.5691 of 2004 was filed by the Applicant in this Court. This Court by order dated 18th January 2005 disposed of the said application. This Court observed that the question whether the Applicant was entitled to parity was not considered by the learned Special Judge. This Court observed that the Application of the Applicant was rejected merely because his earlier application for bail was rejected by this Court and the order of this Court was confirmed by the Supreme Court.

This Court held that the said reasoning of the learned trial Judge was improper because the earlier bail application filed by the Applicant was on the ground of infraction of mandatory requirement of sections 167 and 309 of the Code of Criminal Procedure, 1973. Therefore, the Applicant was relegated before the learned Special Judge who was directed to decide the question regarding parity on its own merits in accordance with the law. This Court kept all questions on merit open. Thereafter the case for bail was considered afresh by the learned Special Judge and he rejected the application for bail by order dated 5th February 2005.

3. Shri Mohite, the learned Counsel appearing for the Applicant invited my attention to the order dated 15th October 2004 passed by the Apex Court in Criminal Appeal No.1201 of 2004 in the case of co-accused Pandharinath D.Wani. He also placed reliance on similar order passed by the Apex Court in Criminal Appeal No.455 of 2005 on 28th March 2005 granting bail in favour of Dr.S.D.Karnik. He submitted that Dr.Karnik and Shri Wani have been enlarged on bail by the Apex Court on the ground that the said Accused have completed two years and three months in custody and there was no likelihood of the trial being concluded for considerable length of

time. The Apex Court observed that about 1211 witnesses have been cited by the prosecution. He placed reliance on the order passed by this Court in favour of another Accused Sanjay Gangadhar Patil and submitted that the Applicant is entitled to parity as the Applicant is also in custody for the last more than two years. He submitted that Dr.Karnik was the main accused in the MPSC Scam and there is no reason why the Applicant should not be enlarged on bail. He pointed out that while granting bail to the Accused Sanjay G.Patil in Criminal Application No.3068 of 2004, the learned Single Judge of this Court has interpreted the order passed by the Apex Court in the case of Shri Wani. He submitted that the learned Special Judge could not have rejected the Application on the ground that the wife of the Applicant met a learned Single Judge of this court before whom the earlier Application for bail was pending. He invited my attention to the affidavit filed by the wife of the Applicant and submitted that the wife of the Applicant visited the residence of the learned Judge on her own and she was not instructed by the Applicant to do so. He submitted that the affidavit of the wife of the Applicant also reveals that there was no intention to influence the learned Judge. He submitted that the application for bail could not have been

rejected on the ground that the Applicant had made allegations against the learned Special Judge in the transfer Application which was filed before the learned Sessions Judge, Mumbai. He submitted that the transfer application in which some allegations are allegedly made against the learned Special Judge was not signed by the Applicant alone but was signed by 15 other Accused who have been enlarged on bail. He submitted that it was the right of the Applicant to invoke statutory provisions of the Code of Criminal Procedure, 1973 and to apply for transfer on the ground of bias and on other grounds. He submitted that though the Application for Transfer has been rejected, the order rejecting the Application has been challenged by the Applicant by filing Criminal Appeal No.3173 of 2004 which is pending in this Court. Since the said Appeal is pending in this Court, the merits of the allegations made in the Transfer Application cannot be gone into. Referring to the subsequent Transfer Application filed by the Applicant, he submitted that even this Court in order dated 2nd March 2005 passed in Criminal Applications Nos.51 and 52 of 2005 observed that the learned Special Judge should not be assigned more than one category of matters which are triable by the Special Judge. He pointed out that considering the fact that expeditious

disposal at the hands of the learned Special Judge is not possible, the Second Application has been made. Shri Mohite further submitted that the allegation regarding the attempt to influence the witnesses has not been established by the prosecution. He submitted that reliance placed on one of the earlier offences pertaining to the examination conducted by the MPSC cannot be considered. In fact the Applicant has been cited as a witness in the said case. He submitted that the role played by the Applicant is no different from the role played by Dr.karnik and therefore, the Applicant ought to have been enlarged on bail. It must be also noted here that on 17th June 2005 when this Application was heard, Shri Mohite orally submitted that the Applicant was ready and willing to withdraw the allegations made against the learned Special Judge.

4. The learned A.P.P. Shri Gadkari appearing for the State has invited my attention to the various averments made in the affidavit-in-reply. He has also invited my attention to the affidavit filed by the wife of the Applicant. He submitted that scandalous allegations have been made against the learned Special Judge by the Applicant. He has taken me through the allegations made in the Transfer Application made by the Applicant. He

invited my attention to the fact that subsequent transfer application (Miscellaneous Application) No.96 of 2005 has been filed by the Applicant on 9th June 2005 before the learned Sessions Judge, Mumbai, without disclosing that in May 2004, Criminal Appeal No.3177 of 2004 has been filed by the Applicant for challenging the order of rejection passed in the earlier Transfer Application. Shri Gadkari placed reliance on a decision of the Apex Court a reference to which will be made at later stage.

5. Shri Gadkari submitted that considering the conduct of the Applicant it is obvious that there is a substance in the apprehension of the prosecution that the Applicant may try to tamper with the evidence if he is enlarged on bail. He submitted that considering the conduct of the Applicant, if he is enlarged on bail he will create hurdles in the progress of trial. The learned A.P.P. lastly submitted that the prosecution case against the Applicant is totally different. The allegation against the Applicant is regarding acceptance of money from the candidates who appeared in the examination conducted by the MPSC. He submitted that the Applicant was a key conspirator in the offence.

6. I have considered the rival submissions. It is necessary to refer to orders passed by the Apex Court in the case of Dr.S.D.Karnik and P.D.Wani. For the sake of convenience reference is made only to the order passed in the case of P.D.Wani. The Apex Court directed that P.D.Wani should be enlarged on bail by making following observations:

> . "He was arrested on 6th of October 2002. He has already completed more than two years in jail. There is no likelihood of the trial being concluded for a considerable length of time. We are given to understand that 1211 witnesses have been cited by the prosecution for examination."

The same is the ground given by the Apex Court while enlarging Dr.Karnik on bail. I have also perused the order dated 22nd December 2004 passed by this Court in the case of co-accused S.G.Patil. Relying upon the decision of the Apex Court in the case of P.D.Wani, the learned Single Judge has enlarged accused Sanjay Patil on bail. As far as the role played by the Applicant is concerned, the Applicant is described as a key conspirator. Dr.Karnik has been described as the main

conspirator. The Apex Court in the orders passed in the case of P.D.Wani and Dr.Karnik has observed that they should be enlarged on bail having spent more than two years in Jail and there is no likelihood of early conclusion of trial. If the facts and circumstances of the case of the Applicant were not different, there was no reason why the principle of parity should not be applied to the Applicant. Before considering the reasons given by the learned Special Judge for not applying parity to the present Applicant, a reference will have to be made to the decision of the Apex Court reported in AIR 1962 S.C. page 253 (The State v/s.Captain Jagjit Singh). The Apex Court was examining the question whether an accused should be given benefit of parity while considering the Application for bail. The Apex Court in paragraphs 3 and 4 observed that:

> "3.....It should then have taken into account the various considerations, such as, nature and seriousness of the offence, the character of the evidence, **circumstances which are peculiar to the accused,** a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with,

the larger interests of the public or the State, and similar other considerations which arise when a Court is asked for bail in a non-bailable offence. It is true that under S.498 of the Code of Criminal Procedure, the powers of the High Court in the matter of granting bail are very wide; even so where the offence is non-bailable, various considerations such as those indicated above have to be taken into account before bail is granted in a non-bailable offence. This the High Court does not seek to have done, for it proceeded as if the offence for which the respondent was being prosecuted might be a bailable one.

4. The only reasons which the High Court gave for granting bail in this case were that the other two persons had been granted bail, that there was no likelihood of the respondent absconding, he being well-connected, and that the trial was likely to take considerable time. **These are however not only considerations which should have weighed with the High Court** if it had considered the matter as relating to a non-bailable offence under S.3 of the Act."

(Emphasis supplied).

Therefore, what is required to be examined is the circumstances which are peculiar to the Applicant and other factors which normally govern the grant of relief of bail. The circumstances which are peculiar to the particular accused are required to be considered while considering claim on the basis of partiy. At this stage, it will be necessary to refer to the grounds given by the learned Special Judge for rejecting the Application made by the Applicant. The learned Judge has observed that:

> "Keeping in mind facts as above, from the say of prosecution apart from application attempting to influence the Honourable Judge of the Honourable High Court during the pendency of hearing of his bail application, admittedly after rejection of his earlier application by this Court, made futile attempts by making false applications and complaints against the I.O. and his team, by filing complaint before the designated MCOCA Court and from the order of MCOCA Court it further appears that co-accused in this crime viz. Maneesha Nichat

had also made similar false complaints, at the behest of Applicant. From the copies of order passed by the designated Court, which are made available by prosecution, it appears that on the directions of said Court the complaints were duly inquired into by the Commissioner of Police, Mumbai and by an officer of the rank of A.C.P. respectively and from the inquiries made as above both the complaints were found to be without any basis and the designated Court thus observing that same are filed to harass the investigating agency and to pressurise them, dismissed the same on 10/11/2004 and on 19/9/2004.

Similarly applicant and others had earlier also filed an application before the Principal Judge of this Court for transfer of this case from the file of this Court to some other Judge under Prevention of Corruption Act being M.A.No.20/2004 which came to be dismissed by the Hon. Principal Judge vide its order passed on 30/4/2004 and 7/5/2004. More so Applicant after rejection of his application for bail by this Court, earlier on the ground of parity had

gone a step further by filing a contempt petition against this Court in person, copy of which is received by this Court by regd.post through the Superintendent of Thane Central Jail.

All these acts on the part of the Applicant thus certainly distinguishes his case as he is more instrumental in the commission of present crime and even thereafter, as against other co-accused."

The learned Special Judge proceeded to observe further:

"Though from the say of the prosecution involvement of Applicant is also found in other criminal cases, no much significance can be given to this fact as has been ruled by the Honourable High Court in a case of Sanjay Patil that pendency of criminal trial cannot be a ground to refuse bail to the Applicant/accused. However in view of the fact of Applicant attempting to influence the Judge of the Honourable High Court at the time of hearing of his earlier bail application, his making false

> complaints against the investigating agency along with other co-accused, his involvement in manipulating earlier examinations held by M.P.S.C. other than the present crime, having involved in receipt of Demand Draft of Rs.10 lakhs by way of Hawala transaction and having involved in influencing computer staff of the commission, prior to present incident with intention to manipulate the data of the said M.P.S.C. examinations held earlier, his initiating contempt petition against this Court in person before the Honourable Apex Court etc. definitely distinguishes the case of the Applicant from that of co-accused."

7. The Applicant has also not disputed that his wife had visited the residence of a learned Judge of this Court before whom the earlier application of the Applicant for bail was to appear. The explanation given by the Applicant is that his wife did not visit the residence of the learned Judge at his instance or on his instructions. It is pertinent to note that in this application an affidavit of the wife of the Applicant has been placed on record. The wife of the Applicant has stated in the affidavit that it was her personal

decision to approach the learned Judge of this Court as she felt helpless. A perusal of the affidavit shows that the wife of the Applicant has narrated in detail as to what transpired when she visited the residence of the learned Judge. She has tried to describe in detail her conversation with the learned Judge. While affirming the affidavit, the wife of the Applicant has been identified by the Advocate appearing for the Applicant. The Applicant in his affidavit has stated that his wife did not visit the residence the residence of the learned Judge at his instance. Tt is unfortunate that the wife of the Applicant has placed on record of this Application an Affidavit in which an attempt is made to set out in detail as to what transpired at the residence of the learned Judge. In my view all this could have been avoided by the Applicant. If there was a sincere desire on the part of the Applicant and his wife to admit the mistake and to tender apology, the matter should have been ended with an apology, but an attempt is made to set out on oath what transpired at the residence of the learned Judge.

8. A reference will have to be made to the Application for transfer made by the Applicant and other 15 accused in the same case. Shri Mohite has rightly pointed out

that it is not only the Applicant but the other 15 Accused have signed the Application making allegations against the learned Special Judge. It is pertinent to note from the order passed by the learned Principal Judge of the City Civil and Sessions Court, Mumbai that the Applicant herein argued the said application in person. It will be necessary to refer to various allegations made by the Applicant against the learned Special Judge in the Application. The said allegations can be broadly summarised as under:

i) The said Judicial officer does not know the provisions of law.

ii) The investigating officer met the learned Judge in his Chamber and the investigating officer visited the residence of the learned Judge and the Investigating officer sponsored the learned Judge’s visit to Vaishnaodevi temple.

iii) The learned Judge happens to be the son-in-law of a Cabinet Minister Shri Vilas Patil and has carried forward the

agenda of Ex.Chief Minister Shri Vilasrao Deshmukh.

iv) The learned Judge was appointed as Special Judge by his father-in-law who was a Minister of the Department of Law and Judiciary in the Cabinet.

9. It is true that after the transfer application in which the aforesaid allegations are made is rejected by the learned Sessions Judge, the said order is the subject matter of challenge before this Court. A copy of the Criminal Appeal No.3173 of 2004 filed by the Applicant in this Court is placed on record. In the said Appeal which is filed only by the Applicant herein it is alleged that the Chief Minister Shri Vilasrao Deshmukh appointed the learned Special Judge as a Special Judge under the Prevention of Corruption Act. It is reiterated that the learned Special Judge is the son-in-law of the then Congress Minister Shri Vilas Patil. In the grounds of challenge which are set out in the Appeal it is contended that the learned Principal Judge has failed and neglected to consider the fact that the learned Special Judge is related to the Minister.

10. On 9th June 2005 Miscellaneous Application No.96 of 2005 is filed by the Applicant alone for transfer of his case from the Court of the learned Special Judge. The allegation of bias has been made against the learned Special Judge in the said application. It is alleged that the learned Special Judge has committed contempt of the Court. At this stage it will be necessary to mention that the Applicant had filed a petition in the Apex Court alleging that the learned Special Judge has committed contempt of Court. Shri Mohite appearing for the Applicant submitted that the said Application is not entertained. Today, during the course of hearing the learned A.P.P. has placed on record, an order passed by the learned Sessions Judge Mumbai on 29th June 2005 in the said Transfer Application No.96 of 2005. The learned Judge has noted that the learned A.P.P. pointed out to him that the Criminal Appeal No.3173 of 2004 has been filed by the Applicant in this Court for challenging the order passed on the transfer application and the prayer made in the said Appeal was the same as made in the Misc.Application no.96 of 2005. The learned Judge noted the submission of the Applicant that Application No.96 of 2005 was on separate count and therefore, he did not desire to withdraw the said Application on the ground of the pendency of the Appeal.

11. As narrated earlier on, 17th June 2005 when this Application was heard before me, Shri Mohite the learned Counsel appearing for the Applicant had fairly stated that the Applicant will withdraw the allegations made against the learned Special Judge. After 17th June 2005 this Application was placed before this Court on 23rd June 2005. Till today no application or an Affidavit or a statement signed by the Applicant for withdrawing the allegations made by him against the learned Special Judge has been filed. On the contrary, the order dated 29th June 2005 passed by the learned Sessions Judge shows that the Applicant is still pressing the allegations made against the learned Special Judge in his Transfer Application No.96 of 2005. In the said Application specific allegation is that the learned Special Judge is unfair, biased and prejudiced.

12. It is to be borne in mind that the allegations are not only of bias but specific allegation is that the learned Special Judge is pursuing the agenda of the Chief Minister and he has been appointed as a Judge by a Minister who is stated to be his father-in-law and he has been appointed as a Special Judge at the instance of the said Minister and the Chief Minister.

13. It is to be noted that the Second Transfer Application being Misc.Application No.96 of 2005 was made in June 2005 during the pendency of this bail application. I have reproduced the nature and extent of allegations made by the Applicant against the learned Special Judge. It is also to be noted here that after the Applicant's wife attempted to meet the learned Judge of this Court, the said learned Judge removed the matter from her Board and it was assigned to some other Judge.

14. In so far as the allegation made by the State regarding influencing the witnesses is concerned, I find that there is no material placed in support of the said contention and that is not accepted by the learned Special Judge.

15. It will also be necessary to refer to the affidavit-in-reply filed by the State. Reliance is placed on the averments made in paragraph 4 of the said affidavit-in-reply. The relevant sub-paragraphs of paragraph 4 read thus:

> "v. Investments made during the period of this conspiracy i.e. from 1999 to 2002 is

around Rs.70 lacs (market value more than a crore) has been traced in the name of the present applicant accused and his family members which includes a suspected hawala transaction of Rs.10 lacs obtained as gift from Dubai in the name of his two minor daughters. The said transactions are unexplained till date. The Income Tax Department vide their letter dated 18.4.2005 has informed that a Income Tax Demand has been raised against this Applicant for Rs.10,97,575/- for the assessment year 1999-2000.

vi. The applicant accused is a suspended Class-I officer and was earlier working as P.A. to Minister in Mantralaya, Mumbai. He was earlier arrested in a case vide GB CB CID C.R.No.93 of 1993 u/s.409, 34, 120(B) of Indian Penal Code r/w. 4, 7 of the Maharashtra Prevention of Malpractices at University, board and other Specified Examination Act of 1982. He was later on discharged for want of sufficient evidence. This was a case which is related to the

leakage of Maharashtra Public Service Commission question paper in the year 1993.

ix. After his bail applications came to be rejected and he got the knowledge that the IO has recommended the application of MCOCA provisions, the application accused tried to create fear in the mind of the Investigation Officer and his team by lodging false complaint before the Hon'ble Spl.Court under the MCOCA by making an application from Jail dated 21.4.2004 and examined witnesses in support of the same. I say and submit that the Hon'ble Spl.Court after holding due enquiry and after recording the evidence of necessary witnesses, was pleased to dismiss the same on 6.11.2004. I crave leave of this Hon'ble Court to refer to and rely upon the said order dt.6.11.2004 of the Hon'ble Spl. Court under MCOC Act as and when required in the interest of justice.

x. It is suspected that, when the ill gotten amount still available/untraced at the disposal of the applicant accused he is

financing the other accused persons to make repeated allegation against the investigation team members and create fear in their mind. One such application vide Misc.application No.178/2004 was filed before the Hon.Spl.Judge under MCOC Act with a prayer for the application of MCOCA to the investigation team. This application was made by the accused Smt.Manisha Nichat which after enquiry came to be rejected/dismissed on 14th September 2004 by the Hon.Spl.Judge. I crave leave of this Hon'ble Court to refer to and rely upon the said order dt.14.09.04 of the Hon'ble Spl.Court under MCOC Act as and when required in the interest of justice.

xi. Prior to the above allegation, the applicant accused even did not spare in making allegation against the Hon'ble Spl. Judge (Trial Court) Shri P.N.Deshmukh and I.O. (myself) by filing Misc.Application No.20/2004 on 19.1.2004 before the Hon'ble Principal Judge, Court of Sessions, Mumbai with baseless allegations and request for change of Trial Court with an intention to dissuade the

> investigation team from either continuing with the investigation or with a view to create fear in the minds of the investigation team. The Hon'ble Principal Judge after hearing the accused persons at length and the submissions made by the prosecution, rejected the Misc.Application No.20/2004 on 1.5.2004 filed by this applicant accused."

16. It is also to be noted that the Applicant filed a complaint against the Investigating Officer and his team before the designated MCOC Court. The complaint was enquired into by the Commissioner of Police and it is stated that the complaint was found to be without any substance. There is an observation made by the designated Court (presided over by a Judge other than the learned Judge against whom allegations are made by the Applicant) that the complaint has been filed with a view to pressurise the investigating agency. The case of the State is that one more Accused Manisha Nichat made a similar complaint against the Investigating Officer and on enquiry the said complaint was found to be false. Though there is no clear finding to that effect, the case made out by the State is that the said complaint was also filed at the instance of the

Applicant.

17. At this stage reference will have to be made to a decision of the Apex Court reported in (1978) 1 SCC 240 (Gudikanti Narasimhulu & others v/s. Public Prosecutor, High Court of Andhra Pradesh), wherein V.R.Krishna Iyer J. (as he then was) has laid down principles governing the grant of bail. Paragraph 7 to 9 of the said Judgment are relevant.

> "7. it is thus obvious that the nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable, if convicted or conviction is confirmed, also bears upon the issue.
>
> 8. **Another relevant factor is as to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being.**
>
> 9. **Thus the legal principles and practice validate the Court considering the likelihood of the applicant interfering with witnesses**

> **for the prosecution or otherwise polluting the process of justice.** It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record - particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of society. Bail discretion, on the basis of evidence about the criminal record of a defendant, is therefore not an exercise in irrelevance." (Emphasis supplied)

The Apex Court has held that whether the course of justice would be thwarted by the person who seeks to invoke the bail jurisdiction is a relevant factor. The Apex Court also held that the legal principles and practice validate the Court considering the likelihood of the applicant otherwise polluting the process of justice.

18. The observations which are made by the learned Special Judge while rejecting the Application which are quoted in earlier part of this order are precisely on the point that there is likelihood of the Applicant polluting the process of justice. No fault can be found with the view taken by the learned Judge as the course of conduct of the Applicant shows that there is likelihood of the Applicant thwarting the course of justice and polluting the process of justice. The said apprehension is supported by the fact that though the learned Counsel for the Applicant in his usual fairness made a statement on 17th June 2005 that the Applicant is willing to withdraw the allegations made against the learned Special Judge, on 29th June 2005 the Applicant appearing in person before the learned Sessions Judge insisted on prosecuting the second Transfer Application made by him. Moreover, no statement in writing or the Affidavit of the Applicant is filed till today on record to the effect that the allegations against the learned Special Judge have been withdrawn. In my view, considerations which weighed with the learned Special Judge in rejecting the application for bail are very relevant and material considering the seriousness and gravity of the offence and the magnitude of the MPSC Scam. There are strong circumstances which are peculiar

to the accused which disentitle him to bail. If this is the conduct of the Applicant while in custody, it is obvious that the apprehension of the Investigating Agency about his conduct after he is enlarged on bail is well founded.

19. In this view of the matter I find no reason to differ from the view taken by the learned Special Judge and the Application is rejected.

Judge.